82-840

No.

Office - Supreme Court, U.S.
FILED
NOV 17 1982
ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections,

Petitioner,

-v-

JAMES DUPREE HENRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, FL 32301
(904) 488-0290

QUESTIONS PRESENTED

I. WHETHER THE LOWER COURT ERRED IN HOLDING THAT WHERE STATE COURTS' OPINIONS DO NOT MAKE IT CLEAR THAT A POINT IS NOT PASSED UPON DUE TO FAILURE TO PRESERVE IT BY TIMELY OBJECTION, THE STATE MUST BE PRESUMED TO HAVE APPLIED ITS OWN RULES TO REACH AND REJECT THE CLAIM ON THE MERITS.

II. WHETHER THE DECISION OF THE LOWER COURT THAT IT IS CONSTITUTIONAL ERROR TO ALLOW A JURY IN A CAPITAL CASE TO CONSIDER A NONSTATUTORY AGGRAVATING CIRCUMSTANCE EVEN THOUGH PERMISSIBLE UNDER FLORIDA LAW AT THE TIME OF TRIAL, IS CONTRARY TO THE DECISION IN PROFFITT v. FLORIDA, 428 U.S. 242 (1976).

III. WHETHER THE LOWER COURT IN HOLDING THAT A PROCEDURAL DEFAULT IN THE INSTANT CASE CAN BE EXCUSED BECAUSE IT WAS DETERMINED THAT THE FLORIDA SUPREME COURT HAD EXCUSED A PROCEDURAL DEFAULT IN AN EARLIER UNRELATED CASE.

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The Attorney General of the State of Florida petitions this Court for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The original opinion of the Florida Supreme Court affirming respondent's conviction and sentence is reported as Henry v. State, 328 So.2d 430 (Fla. 1976). The opinion of the Florida Supreme Court affirming an order denying post-conviction relief is reported as Henry v. State, 377 So.2d 692 (Fla. 1979).

The initial opinion of the Court of Appeals, Fifth Circuit, is reported as Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981)* Following remand by this Court, 102 S.Ct. 2922, the lower court issued its second opinion reported as Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982)*.

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* Former Fifth Circuit Case, Section 9(1) of Public Law 96-452-Oct. 14, 1980.

JURISDICTIONAL STATEMENT

The judgment of the Fifth Circuit Court of Appeals was entered on September 20, 1981.**

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

The Eighth Amendment to the federal constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

The Fourteenth Amendment to the federal constitution provides in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State Deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Florida death penalty statute, § 921.141, F.S. (1973), in effect at the time of respondent's trial in June 1974 is as follows:

> 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--
>
> (1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the

court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trail [sic] jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.--After hearing all the

evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Rule 3.390(d), Florida Rules of Criminal Procedure, provides as follows:

(d) No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. Opportunity shall be given to make the objection out of [the presence of] the jury.

STATEMENT OF THE CASE

A. History of the Case

Respondent was convicted and sentenced to death for the crime of first degree murder on June 26, 1974. The Florida Supreme Court affirmed both conviction and sentence. 328 So.2d 430. This Court denied a petition for writ of certiorari on November 8, 1976. 429 U.S. 951. Rehearing was denied February 22, 1977. 429 U.S. 1124.

Pursuant to Gardner v. Florida, 430 U.S. 349 (1977), respondent filed an application for relief in the Florida Supreme Court on or about August 8, 1977. This was denied by order of that court dated January 30, 1978, and rehearing was denied by order dated December 5, 1978. On or about May 7, 1979, respondent filed a second petition for writ of certiorari in

this Court which was denied by order dated October 1, 1979. Rehearing was denied on October 29, 1979.

On November 2, 1979, respondent filed a motion for post-conviction relief in the Circuit Court, in and for Orange County, Florida. A hearing was held on November 16, 1979, following which the trial judge entered an order denying the motion for post-conviction relief. On appeal, the Florida Supreme Court affirmed the order of the state court trial judge denying post-conviction relief. 377 So.2d 692.

Petition for writ of habeas corpus was filed in federal district court on November 27, 1979. Following a hearing begun on November 30, 1979 and thereafter completed on January 11, 1980, the district court entered its order granting the petition for writ of habeas corpus on February 14, 1980. Petition for rehearing was denied by

order dated February 25, 1980.

On appeal, the Eleventh Circuit Court of Appeals (Former Fifth Circuit Case) affirmed the order of the district court granting the petition for writ of habeas corpus. Petition for Rehearing and Suggestion for Rehearing en banc were denied on Janury 26, 1982. By order dated February 3, 1982, the lower court stayed its mandate to and including February 25, 1982, which was continued by order entered by Mr. Justice Powell on February 23, 1982, pending the timely filing and disposition of a petition for writ of certiorari.

By order dated June 14, 1982, this Court vacated the judgment of the lower court and remanded for further consideration in light of Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982). In an opinion filed September 20, 1982 the court below again

affirmed the judgment of the district court.

B. Statement of the Facts

The facts as found by the Florida Supreme Court (328 So.2d 430) are as follows:

> Appellant was indicted for murder in the first degree in that he did with premeditated design kill and murder Z. L. Riley by suffocating him with a gag, and was found guilty. The majority of the jury recommended that the death penalty be imposed and the trial judge, having considered the mitigating and aggravating circumstances, sentenced appellant to death.
>
> The victim was found in the bedroom of his home bound and gagged with his throat cut. Two double edge razor blades were lying near his body covered with dried blood. The pockets of the deceased's pants were turned inside out, but no wallet, money or personal effects were found. Appellant's thumb print was found in the victim's bedroom. In performing an autopsy on the body of the deceased, Dr. Hegert found extensive head and facial wounds, including two fractures of the jaw and mild to moderate brain hemorrhaging caused by "blunt force," cuts on the hands, and two deep cuts four and five inches long

and several more cuts about the neck consistent with the use of a razor blade. The doctor determined that the actual cause of death was a gag placed tightly under the tongue of the deceased so as to force the tongue back into the throat, cutting off the airway and suffocating the victim.

At the time of the murder, appellant lived next door to the victim. When Officer Ferguson went to arrest appellant at his residence, several days after the murder appellant jumped Ferguson, took his gun, shot Ferguson twice and then fled. He was found an hour later hiding behind a dryer machine, arrested, taken to the Orlando Police Station and advised of his rights. Before interrogation, he was fully advised of his rights, he signed a waiver card, and he advised the officers that he had killed the deceased, and gave the officers full details of the murder. The officers present testified that no promises or threats were made, and that appellant was not offered any hope of leniency or other reward to induce his statements.

Four days before the trial, he filed a motion to suppress his confession. Before trial, the trial judge conducted a lengthy hearing on the voluntariness of the confession, after which the trial judge denied the motion to suppress. At the conclusion of the state's case, defense counsel moved for a directed

> verdict of acquittal which was denied. Relying solely upon the defense of insufficient evidence, appellant did not testify nor call other witnesses. After deliberation for one hour, the jury returned a verdict of guilty. The sentence advisory hearing was then conducted, after which the jury returned a recommendation of the death penalty.

Id. at 430, 431.

REASONS FOR GRANTING THE WRIT

1. The lower court holding that where state courts' opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits directly conflicts with the decisions in Martinez v. Harris, 675 F.2d 51 (2nd Cir. 1982), and Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979). In Martinez, the court remarked as follows:

> Arguments in the Appellate Division cast in the alternative, however, cannot be governed by Washington. Arguing in the

> alternative is a well-accepted practice. For instance, it has been explicitly approved in the rules govening federal trials, Fed.R. Civ.P. 8(e)(2). It therefore makes no sense for us to hold that when a state prosecutor acts as a prudent advocate, he waives any of the alternative arguments that he asserts. Furthermore, we do not believe that the Appellate Division's silence evinces an intent to overlook the procedural error. The interest-of-justice jurisdiction under § 470.15 is not invoked routinely, see e.g., People v. Robinson, 36 N.Y.2d 224, 228-29, 367 N.Y.2d 208, 326 N.E.2d 784 (1975). Therefore, we feel justified in assuming that the Appellate Division does not exercise its discretion under that section and decide a case solely on the merits of a claim, unless it says so. [Footnote omitted.]

Id. at 54.

In Ratcliff, the Fifth Circuit had this to say:

> It is fair to assume that the appellate court applied the procedural default rule. First, the language in the trial court opinion regarding procedural default is absolute and there is no subsequent language which would qualify or compromise it. Second it is well settled that a court will not reach

> a constitutional question if it can rest its decision on nonconstitutional grounds. See Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947). See generally Nowak, Rotunda & Young, Constitutional Law 83-85 (1978). Third, there is no question that the trial court correctly applied Texas law on the procedural issue.

Id. at 478.

In Street v. New York, 394 U.S. 576 (1969), this Court was faced with the situation where petitioner was challenging the constitutionality of a state statute. In solving the jurisdictional dilemma created where the state court opinion fails to specifically mention a constitutional question, this Court had this to say:

> The New York Court of Appeals did not mention in its opinion the constitutionality of the "words" part of §1425, subd 16, par d. Hence, in order to vindicate our jurisdiction to deal with this particular issue we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of

> Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U.S.C. §§ 1257(2), 1257(3); Bailey v. Anderson, 326 U.S. 203, 206-207, 90 L.Ed. 3, 5, 6, 66 S.Ct. 66 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary. [Emphasis added.]

394 U.S., at 581-582. The Court elaborated on this principle in Webb v. Webb, 451 U.S. 492 (1981). See also Fuller v. Oregon, 417 U.S. 40 (1974), and Chambers v. Mississippi, 410 U.S. 284 (1973).

While Ratcliff understandably follows the reasoning of prior Second Circuit cases, i.e., Taylor v. Harris, 640 F.2d 1 (2nd Cir. 1981), Gruttola v. Hammock, 639 F.2d 922 (2nd Cir. 1981), Guichard v. Smith, 517 F.Supp. 942 (E.D. N.Y. 1981), Gilmore v. Curry, 523 F.Supp. 1205 (S.D.

N.Y. 1981), it also follows the Ninth Circuit case of Lewis v. Cardwell, 609 F.2d 926 (9th Cir. 1980).

Therefore, it is submitted that where the opinion of the highest state court is silent on a particular issue, then federal courts must assume that the omission was due to want of proper presentation in the state courts.

2. After reaching the erroneous conclusion that respondent's constitutional claim was decided on the merits rather than having been rejected on procedural grounds, the lower court remarked as follows:

> We adhere to our earlier judgment that the state trial court committed constitutional error by allowing the non-statutory aggravating circumstances to be placed before and considered by the jury at Henry's sentencing hearing. 661 F.2d at 60.

686 F.2d, at 315. According to the lower court, it is now error as a matter of constitutional law to allow a jury in a

capital case to consider a nonstatutory aggravating circumstance even though permissible under state law at the time of trial. Thus, this Court has before it for review a new principle of constitutional law.

Petitioner submits that the holding of the lower court must be viewed as nothing less than an outright repudiation of this Court's holding in Proffitt v. Florida, 428 U.S. 242 (1976). The Proffitt opinion sets forth the aggravating circumstances found by the trial judge as follows:

> (1) The murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious bodily harm and death to many persons.

Proffitt, 428 U.S., at 246. This is particularly interesting because the

aggravating circumstance of "propensity to commit murder" is not now and never has been a statutory aggravating circumstance [§ 921.141, F.S. (1975)]. See Proffitt, 428 U.S. 248, n. 6, which sets forth the statutory aggravating circumstances in effect at the time Proffitt was decided. The unmistakable conclusion is that this Court approved the use of a nonstatutory aggravating circumstance when used along with other statutory aggravating circumstances for the purpose of supporting the imposition of the death penalty. This is diametrically opposed to the holding of the lower court.

While it is true that under existing case law in this jurisdiction, only statutory aggravating circumstances may now be considered by a jury for the purpose of making a recommendation to the trial judge and used by him to support the imposition

of the death penalty. Purdy v. State, 343 So.2d 4 (Fla. 1977). However, at the time of respondent's trial, the jury was properly instructed that it could consider a nonstatutory aggravating circumstance.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court was confronted with a situation where it was necessary to determine whether the use of a nonstatutory aggravating circumstance was constitutionally permissible. The court then engaged in an exhaustive analysis of Proffitt, concluding as follows:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that non-statutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute. [Emphasis added.]

Id. at 1002, 1003. Therefore, under the reasoned analysis of Proffitt by the Florida Supreme Court, the existence of statutory aggravating circumstances in the absence of mitigating circumstances renders unimportant the existence of nonstatutory aggravating circumstances. And in respondent's trial, the trial judge found that there were no mitigating circumstances. But please note, the lower court in Proffitt v. Wainwright, _____F.2d _____ [(11th Cir. 1982), Case No. 80-5977], announced a new rule disallowing the use of non-statutory aggravating circumstances under any factual setting. This is in direct conflict with the rule announced by the Florida Supreme Court in Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1977); Hargrave v. State, 366 So.2d 1 (Fla. 1979);

and Sireci v. State, 399 So.2d 964 (Fla. 1981). And again, the Eleventh Circuit's holding in Proffitt v. Wainwright, supra, is a direct repudiation of this Court's decision in Proffitt v. Florida, 428 U.S. 506 (1976).

It is clear that the lower court is not going to affirm any death penalty case where a nonstatutory aggravating circumstance has been utilized in any manner. This precise issue is now pending before this Court in Barclay v. State of Florida, Case No. 81-6908, certiorari granted November 8, 1982.

3. For a second time the court below has side-stepped the mandate of Engle v. Isaac, _____U.S.____, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982). This was done by repudiating what it wrote in its initial opinion reported at 661 F.2d 56 and by relying on what it terms a waiver of

procedural default by the Florida Supreme Court in an earlier unrelated case, i.e., Brown v. State, 206 So.2d 377 (Fla. 1968). This is a fallacious, albeit interesting, thesis.

At the very outset of its opinion, the lower court cites Isaac for the proposition that failure to comply with a state procedural rule, such as a contemporaneous objection rule, bars federal habeas relief of alleged constitutional error absent a showing of cause for noncompliance and actual prejudice. Henry, 686 F.2d, at 312. After reviewing what it terms "the grounds supporting the conclusion that Henry's claim was properly presented for federal habeas review," the lower court succinctly stated as follows:

> The state argues that procedural default occurred when counsel failed to belabor the point by restating his contentions when the trial judge, in keeping with his earlier

> ruling, instructed the jury to consider "all factors which are aggravating including, but not limited to," those enumerated in the statute. We do not view the failure of trial counsel to belabor a point once raised and clearly lost as a procedural default under Florida law.

Henry, 686 F.2d, at 314. Then, in footnote 3, the court attempts to explain its previous "futility" position by saying that "[w]e were not stating that futility would constitute cause for failure to object at trial under the Sykes cause and prejudice test, thus Isaac does not affect our analysis on that point." Rather, as the court now explains, its position as to the futility of further objection was based on the standard by which procedural defaults could be assessed under Florida law. This is more than an explanation of a prior holding; it is a change of position to avoid the impact of Isaac.

In its initial opinion, 661 F.2d 56, the lower court stated:

> At that time, the trial judge overruled the objection and made clear his intention to allow such evidence to go to the jury. Id. In light of this ruling, any further objection to the jury instructions permitting consideration of non-statutory aggravating factors would have been futile.

Henry, 661 F.2d, at 58. It is submitted that the futility above mentioned had reference to the futility of objecting to a point once raised and clearly lost, rather than any standard by which procedural defaults could be assessed under Florida law, as urged in footnote 3. Henry, 686 F.2d, at 314. Supportive of petitioner's position, note the following:

> As the district court noted, the direction to the arresting officer's testimony was sufficient to put the trial judge on notice that the defense would object to any instructions allowing consideration of this evidence.

Henry, 661 F.2d, 58. It is difficult, if

not impossible, to read the above-quoted language without concluding that the lower court simply thought that respondent's trial attorney had no obligation to make a second objection as it would have been futile, because the first one had been denied.

But more important than the attempted about-face on the futility-of-objection position, the lower court's thesis that the procedural default could be waived on the basis of Brown v. State, 206 So.2d 377 (Fla. 1968), is gross error. The initial opinion of the lower court, 661 F.2d 56, 57, 58, and the instant opinion for which petitioner seeks review, 686 F.2d 311, 314, unmistakably stand for the proposition that a federal habeas court can excuse a procedural default if it can be determined that the state appellate court had excused a procedural default in an earlier

unrelated case. In the instant case, the lower court sought to excuse (and did excuse) the procedural default because in another case decided approximately thirteen years previously the Florida Supreme Court had excused a procedural default. Unmistakably then, the position of the lower court is that where a state court can excuse a procedural default because of having a rule or statute authorizing it to do so in certain instances, a federal habeas court may consider the merits of the issue, notwithstanding the Sykes rule. This is but another effort to render Sykes impotent. An effective answer is found in Gruttola v. Hammock, 639 F.2d 922 (2nd Cir. 1981), where the court remarked as follows:

> Under Wainwright v. Sykes, supra, federal courts on habeas review of state convictions will not entertain federal claims on which the state courts have refused to pass due to procedural defaults. Gruttola argues, however, that Wainwright

> does not preclude our consideration of the merits of his publicity claim because the state appellate courts could overlook the procedural default and in fact passed upon the merits of his publicity claim, albeit in an extremely summary fashion. We disagree. [Emphasis ours.]

Id. at 928, 929. The lower court in footnote 3, 686 F.2d 314, cites Brown v. State, supra, as being the case by which procedural defaults could be assessed under Florida law. Let's put this in proper perspective. In the instant case, no objection whatever was made to the instruction and this notwithstanding the contention of the lower court that the trial judge should have possessed the psychic ability to read the mind of defense counsel and then practice law in his behalf. However, in Brown v. State, supra, Brown's attorney orally requested a verdict form on larceny. The trial judge in unmistakable language advised that he was

not going to give a charge on larceny. Defense counsel then timely objected to the judge's failure to instruct on larceny. Then, in determining that the issue had been properly preserved for appellate review, the Florida Supreme Court remarked as follows:

> It is equally clear that he [trial judge] had no intention of giving the larceny charge regardless of whether a written motion or formally drafted charge were submitted. It would have been a totally useless gesture for counsel to have tendered a prepared intruction. The judge simply refused to give any instruction on larceny.

Id. at 384. It was in this context that the Florida Supreme Court determined that a lawyer is not required to pursue a completely useless course. The difference between the alleged default, if you can call it that, in Brown and that found in the instant case is too obvious to require further comment.

The real issue in the present case is whether respondent should be permitted to attack his conviction on the basis of an instruction that was proper under the law at the time of his trial and that was neither objected to at trial nor challenged on appeal, the opinion of the lower court to the contrary notwithstanding. Of course, as previously stated, the lower court answers in the affirmative because, so the reasoning goes, the trial judge should have had the psychic ability to know that defense counsel objected to the instruction; the issue was preserved for appellate review because the Florida Supreme Court affirmed the order of a state trial judge denying post-conviction relief notwithstanding the fact that under Florida law an issue that could or should have been raised on direct appeal cannot serve as a basis for post-conviction relief; the

silence of the Florida Supreme Court shows that the issue was decided on its merits notwithstanding that court's failure to comment thereon; the futility of objection proposition set forth in the lower court's initial opinion, 661 F.2d 56, was not really the same species of futility condemned by this Court in Engle v. Isaac, supra; and it was constitutional error to allow the jury to consider a nonstatutory aggravating circumstance, and this notwithstanding the decision of this Court in Proffitt v. Florida, supra.

Euphemistically, the fact that the foregoing represents a decision of the Eleventh Circuit Court of Appeals is not an elixir that can transform a keg of worms into acceptable legal reasoning. For example, the position of the lower court is in unmistakable conflict with the rationale of Henderson v. Kibbe, 431 U.S. 145, 154

(1977). The reasoning of the lower court effectively obliterates Florida's Contemporaneous Objection Rule. See Rule 3.390, Florida Rules of Criminal Procedure, requiring timely objection to a jury instruction in order to preserve the issue for appellate review. The reasoning of the lower court cannot be sustained because it is in direct conflict with the position taken by this Court in Wainwright v. Sykes, 433 U.S. 72, 88, 90 (1977).

The only viable issues before the federal habeas court and hence before the lower court were ineffective assistance of counsel and a challenge to the death penalty on the ground that it was imposed in an arbitrary, capricious, and irrational manner based on geography, poverty, and other arbitrary factors, neither of which was addressed by the lower court.

CONCLUSION

This makes the fourth appearance of the instant case before this Court. Again, petitioner submits that the instant case is appropriate for summary remand with directions to reconsider in the light of this Court's decisions in Engle v. Isaac, supra, and Proffitt v. Florida, supra, with a caveat similar to that directed to the Fourth Circuit Court of Appeals in Hutto v. Davis, _____U.S._____, 70 L.Ed.2d 556, 561, 102 S.Ct._____(1982).

Petitioner urges that, aside from the conflict hereinabove set forth, a direct conflict in the decisional law between the highest court of a state and any of the circuit courts of appeals provides a valid reason for the issuance of a writ of certiorari. If the Court believes that a summary remand with directions is

inappropriate, then petitioner prays that the writ of certiorari be granted.

Respectfully submitted:

JIM SMITH
Attorney General

By: _____
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petition for Writ of Certiorari to Mr. Craig S. Barnard, Chief Assistant Public Defender, 13th Floor/Harvey Building, 224 Datura Street, West Palm Beach, Florida 33401, by U.S. Mail, this _____ day of November 1982.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

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James Dupree HENRY, Appellant,

v.

STATE of Florida, Appellee.

No. 46105

Supreme Court of Florida.

Feb. 25, 1976.

Rehearing Denied April 21, 1976.

Defendant was convicted in the Circuit Court, Orange County, Peter M. deManio, J., of murder in the first degree, and sentenced to death, and he appealed. The Supreme Court, held that where defendant had lengthy history of violence and had demonstrated callous indifference to human life when he assaulted police officer at time of his arrest, and where acts committed were for pecuniary gain and for no other motive other than perhaps to eliminate witness,

death penalty was properly imposed.

Affirmed.

England, J., and Hensely, Circuit Court Judge, dissented.

Homicide key 354

Where defendant convicted of murder had lengthy history of violence of extremely serious nature and had demonstrated his viciousness and callous indifference to human life when he assaulted police officer at time of his arrest, and where acts committed were for pecuniary gain and for no other motive other than perhaps to eliminate a witness, death penalty was properly imposed. West's F.S.A § 921.141.

Richard L. Jorandby, Public Defender, and Richard Lubin and Martin H. Colin, Asst. Public Defenders, for appellant.

Robert L. Shevin, Atty. Gen.; and Wallace E. Allbritton, Asst. Atty. Gen., for appellee.

PER CURIAM.

Having been transferred to this Court by the District Court of Appeal, Fourth District, this cause is before us on direct appeal from a conviction of murder in the first degree and a sentence of death imposed on appellant by the Circuit Court in and for Orange County, Florida. We have jurisdiction pursuant to Article V, Section 3(b)(1), Constitution of Florida (1973).

Appellant was indicted for murder in the first degree in that he did with premeditated design kill and murder Z. L. Riley by suffocating him with a gag, and was found guilty. The majority of the jury recommended that the death penalty

be imposed and the trial judge, having considered the mitigating and aggravating circumstances, sentenced appellant to death.

The victim was found in the bedroom of his home bound and gagged with his throat cut. Two double edge razor blades were lying near his body covered with dried blood.

The pockets of the deceased's pants were turned inside out, but no wallet, money or personal effects were found. Appellant's thumb print was found in the victim's bedroom. In performing an autopsy on the body of the deceased, Dr. Hegert found extensive head and facial wounds, including two fractures of the jaw and mild to moderate brain hemorrhaging caused by "blunt force,"

cuts on the hands, and two deep cuts four and five inches long and several more cuts about the neck consistent with the use of a razor blade. The doctor determined that the actual cause of death was a gag placed tightly under the tongue of the deceased so as to force the tongue back into the throat, cutting off the airway and suffocating the victim.

At the time of the murder, appellant lived next door to the victim. When Officer Ferguson went to arrest appellant at his residence, several days after the murder appellant jumped Ferguson, took his gun, shot Ferguson twice and then fled. He was found an hour later hiding behind a dryer machine, arrested, taken to the Orlando Police Station and advised

of his rights. Before interrogation, he was fully advised of his rights, he signed a waiver card, and he advised the officers that he had killed the deceased, and gave the officers full details of the murder. The officers present testified that no promises or threats were made, and that appellant was not offered any hope of leniency or other reward to induce his statements.

Four days before the trial, he filed a motion to suppress his confession. Before trial, the trial judge conducted a lengthy hearing on the voluntariness of the confession, after which the trial judge denied the motion to suppress. At the conclusion of the state's case, defense counsel moved for a directed verdict of acquittal which was denied.

Relying solely upon the defense of insufficient evidence, appellant did not testify nor call other witnesses. After deliberation for one hour, the jury returned a verdict of guilty. The sentence advisory hearing was then conducted, after which the jury returned a recommendation of the death penalty.

In support of the death sentence, the trial judge entered the following "Findings in Support of the Verdict:"

> "The Court has considered the itemized points for consideration in aggravation and in mitigation set forth in Florida Statute 921.141 and has also considered the jury's recommendation of death and has for the reasons set forth in open court at the time of sentencing and now made a part of the record together with the following reasons, exercised its discretion, and notwithstanding the recommendation of a majority of the jury, has imposed a sentence of death upon the defendant.

"The defendant has a lengthy history of violence of an extremely serious nature which has been demonstrated by the defendant having been charged on a previous occasion with Assault with Intent to Commit a Felony and having been allowed to plead guilty to the lesser included offense of Aggravated Assault, and having also demonstrated his viciousness and callous indifference to human life when he assaulted Officer Ferguson with the Officer's own pistol at the time of his arrest for the charges in this case, at which time he shot the police officer three times, the last time while the Officer was on his knees begging not to be shot any more. The facts in this case in themselves are atrocious, horrible and cruel almost beyond belief. The defendant has clearly demonstrated that he cannot live in a civilized society in a trustworthy fashion and shortly after his release from prison committed the act charged in this case. The act herein was for pecuniary gain

> and for no other motive other than perhaps to eliminate a witness.
>
> "This Court found absolutely nothing of a mitigating nature to prevent this Court from imposing the death penalty.
>
> "It is, therefore, for the above stated reasons and for those reasons stated in open court subsequently transcribed and now attached to these findings, that the death penalty is imposed."

The trial judge, in open court, further described in great detail the reasons for imposing the death penalty which he incorporated by reference in his above stated findings.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed, and we have also, pursuant to Rule 6.16(b), Florida Appel-

late Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded. Cf. State v. Dixon, 283 So.2d 1 (Fla. 1973); Alford v. State, 307 So.2d 433 (Fla. 1974); Wilson v. State, 304 So.2d 119 (Fla. 1974); Williams v. State, 228 So.2d 377 (Fla.1969), and Reddish v. State, 167 So.2d 858 (Fla.1964).

The jury recommended and the trial judge, upon considering all the mitigating and aggravating circumstances, agreed that the death penalty be imposed for the commission of this atrocious and

heinous crime. We find that the judgment and sentence of the lower court in this cause is in accordance with the justice of the cause.

Accordingly, the judgment and sentence of the trial court are hereby affirmed.

It is so ordered.

ADKINS, C.J., ROBERTS, OVERTON and DREW (Retired), JJ., and MELVIN, Circuit Court Judge, concur.

ENGLAND, J., and HENSLEY, Circuit Court Judge, dissent.

James Dupree HENRY, Appellant

v.

STATE of Florida, Appellee.

No. 58126.

Supreme Court of Florida.

Nov. 27, 1979

The Circuit Court, Orange County, Thomas E. Kirkland, J., denied motion for postconviction relief, and petitioner appealed. The Supreme Court held that: (1) contention that death penalty was unconstitutional as applied may be raised in a postconviction petition, and (2) trial court's refusal to conduct a hearing or grant other relief was proper since counsel's hypothetical, unsupported argument had been rejected in prior cases and no preliminary factual basis for the contention was presented to the trial

judge.

Affirmed.

1. Criminal Law key 998(6)

Contention that death penalty is unconstitutional as applied can properly be raised as a subject for consideration in a proceeding for postconviction relief. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.850.

2. Criminal Law key 998(19)

Trial court's refusal to conduct a hearing or grant other relief on issue of whether death penalty was unconstitutionally applied because it was imposed in an arbitrary, capricious and irrational manner based on geography, poverty and other arbitrary factors was proper since the hypothetical, unsupported argument has been rejected as a

legal basis for relief in prior cases and no preliminary factual basis for the contention was presented to the trial judge.

Richard L. Jorandby, Public Defender, and Craig S. Barnard, Chief Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen. and Wallace E. Allbritton, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This is an appeal from a denial of James Dupree Henry's motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Henry raised, and now seeks review of, twenty issues relating to his trial and original appeal.

[1,2] The circuit court judge ruled that, except for the issue of ineffective assistance of counsel, all the issues either were raised or should have been raised on direct appeal. As to all but one of these rulings, the trial court properly determined that the matters presented may not be attacked in a proceeding for post-conviction relief. Sullivan v. State, 372 So.2d 938 (Fla. 1979). The one issue which was improperly ruled to be foreclosed was Henry's contention that the death penalty is unconstitutionally applied in Florida because it "is imposed in an arbitrary, capricious and irrational manner in Florida based on geography [namely Orange County, Florida], poverty, and other arbitrary factors." This contention can

properly be raised as a subject for consideration in a proceeding for post-conviction relief. We hold, however, that the trial court's refusal to conduct a hearing or grant other relief on this issue was proper under the circumstances. The hypothetical, unsupported argument of counsel has been rejected as a legal basis for relief in Spinkellink v. Wainwright, 578 F.2d 582, 613-14 (5th Cir. 1978), cert.denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), and no preliminary factual basis for the contention was presented to the trial judge in this case.

The circuit court held an evidentiary hearing on the issue of ineffective assistance of counsel and concluded that the evidence and argument

presented to support the assertion lacked merit. Having reviewed that evidence and those arguments, we conclude that the trial court correctly rejected Henry's assertion.

Accordingly, the order of the trial court denying Henry's 3.850 motion is affirmed, and Henry's motion for stay of execution is denied.

Due to the exigencies of this case, we dispense with rehearing.

It is so ordered.

ENGLAND, C.J., and ADKINS, BOYD, OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., concur.

James Dupree HENRY, Petitioner
-Appellee Cross-
Appellant,

v.

Louie L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent-Appellant-
Cross-Appellee.

No. 80-5184.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Nov. 12, 1981.

Florida prisoner under death sentence petitioned for a writ of habeas corpus. The United States District Court for the Middle District of Florida, John A. Reed, Jr., J., granted the writ if the state trial court failed to provide a second sentencing hearing within 90 days of the court's order. Custodian appeal-

ed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) failure of defense counsel to object to jury instructions did not preclude federal habeas review of the alleged error in those instructions where the trial judge had indicated in advance that such objection would be fruitless, and (2) the admission of evidence of nonstatutory aggravating factors and jury instructions allowing consideration of any aggravating circumstances, statutory or nonstatutory, violated the Eighth and Fourteenth Amendments.

Affirmed.

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452--October 14, 1980.

1. Habeas Corpus key 30(1)

Where state trial judge overruled defense objection to evidence and made clear his intention to allow such evidence to go to jury, any further objection to jury instructions permitting consideration of that evidence would have been futile and defense counsel's failure to make such objections did not preclude federal habeas review of alleged error in instructions.

2. Constitutional Law key 270(2)

Criminal Law key 1213

In capital case, admission of evidence of nonstatutory aggravating factors and jury instructions permitting consideration of any aggravating circumstances, statutory or nonstatutory, violated Eighth and Fourteenth Amendments. U.S.C.A.Const.Amends. 8, 14.

Wallace E. Allbritton, Charles A. Stampelos, Asst. Attys. Gen., Tallahassee, Fla., for respondent-appellant cross-appellee.

Craig S. Barnard, Chief Asst. Public Defender, 15th Judicial Circuit, West Palm Beach, Fla., for petitioner-appellee cross-appellant.

Appeals from the United States District Court for the Middle District of Florida.

Before HILL, Circuit Judge, SMITH**, Judge, and HENDERSON, Circuit Judge.

JAMES C. HILL, Circuit Judge:

This appeal requires that we decide whether it is error as a matter of constitutional law to allow a jury in a capital case to consider nonstatutory aggravating factors in deciding whether the death penalty should be imposed.

**Judge U.S. Court of Claims, sitting by designation.

We hold that it is and affirm the district court's grant of a writ of habeas corpus.

Appellee James Dupree Henry was convicted of first degree murder on June 26, 1974 in the Circuit Court for Orange County, Florida. At the sentencing hearing, the state called as a witness the arresting officer who, over defense objection, testified that Henry had taken the officer's gun and wounded him in an attempt to avoid arrest. Henry's counsel objected to this testimony on the ground that it constituted a nonstatutory aggravating factor, [1] and the objection

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1. The Florida capital sentencing statute provides that

[a]ggravating circumstances shall be limited to the following:

was overruled. At the close of the hearing, the trial judge instructed the jury as follows:

> [Y]ou will render an advisory sentence to the court based upon the following matters:
>
> Whether sufficient aggravating circumstances exist, or sufficient mitigating circumstances exist for you to recommend the Death Penalty or Life Imprisonment.
>
> In considering aggravating circumstances, you shall consider all factors which are aggravating including, but not limited to, the following:
> . . . .

(a) The capital felony was committed by a person under sentences of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The Defendant knowingly created a great risk of death to many persons.

Record, Vol.VI at 1035 (Emphasis added). The jury recommended the death penalty, and the trial judge filed findings in support of this penalty and entered sentence accordingly.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

After exhausting his state court remedies,[2] Henry applied for a writ of habeas corpus in the United States District Court for the Middle District of

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(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Fla.Stat.Ann. § 921.141(5) (West Cum.Supp. 1981) (emphasis added). The Florida Supreme Court has construed this section as providing an exclusive list of aggravating factors. Purdy v. State, 343 So.2d 4, 6 (Fla.), cert.denied 434 U.S. 847, 98 S.Ct. 153, 54 L.Ed.2d 114 (1977. We note, however, that this authoritative construction from the state's highest court was not available to the trial judge at the time of Henry's trial.

2. Henry's conviction and sentence were afffrmed on appeal to the Florida Supreme Court. Henry v. State, 328 So.2d 430 (Fla.), cert. denied, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976). That court also affirmed the state trial court's denial of a motion to vacate the judgment and death sentence. Henry v. State, 377 So.2d 692 (Fla. 1979).

Florida, Orlando Divison. On the basis of the erroneous jury instruction which allowed the sentencing jury to consider nonstatutory aggravating factors, the district court granted the writ if the state trial court failed to provide a second sentencing hearing within ninety days of the court's order.

Louie L. Wainwright, Secretary of the Department of Corrections for the State of Florida, appeals the granting of the writ. Two issues are presented for decision: (1) whether the failure of Henry's counsel to object to the jury instructions precludes federal habeas review of the alleged error in these instructions; and (2) if not, whether the state trial court committed an error of

constitutional dimension in admitting evidence of and permitting jury consideration of nonstatutory aggravating circumstances.[3]

[1] Under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), failure to comply with a state procedural rule, such as a contemporaneous objection rule, bars federal habeas review of alleged federal constitutional error in admission of the evidence absent a showing of cause for noncompliance and actual prejudice. Appellant Wainwright points out that Henry's counsel failed

3. Because we dispose of these issues in Henry's favor, we need not address the issues raised by Henry's cross-appeal.

to object to the trial judge's instructions to the jury as required by Florida's contemporaneous objection rule[4] and thereby had waived any claim of error in the instructions. This circuit, however, has held that procedural defaults may be excused, notwithstanding Wainwright, if the state's own rules excuse such default. McKinney v. Estelle, 657 F.2d 740, 742 n.1 (5th Cir. 1981); Clark v. Blackburn, 632 F.2d 531, 533 n.1 (5th Cir. 1980).

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4. Florida Rule of Criminal Procedure 3.390(d) provides:

(d) No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . .

The Florida Supreme Court has excused such procedural default in similar circumstances. In Brown v. State, 206 So.2d 377 (Fla. 1968), that court held that the failure by accused's counsel to submit as required a request for particular jury instructions did not preclude appellate review of alleged error in the instructions given where the trial judge had already made clear that he would not charge the jury as counsel desired. Id. at 384. The rationale in Brown that "[a] lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless," id. (citing Birge v. State, 92 So.2d 819 (Fla. 1957), is equally applicable here. At Henry's

trial, his counsel objected to the testimony of the arresting officer on the grounds that it was evidence of a nonstatutory aggravating factor. Record, Vol. VI at 1012-13. At that time, the trial judge overruled the objection and made clear his intention to allow such evidence to go to the jury. Id. In light of this ruling, any further objection to the jury instructions permitting consideration of nonstatutory aggravating factors would have been futile. As the district court noted, the objection to the arresting officer's testimony was sufficient to put the trial judge on notice that the defense would object to any instructions allowing consideration of this evidence. For these reasons, we hold that the failure

of Henry's counsel to object to the jury instructions does not preclude federal habeas review of the alleged error in the instructions.

II.

[2] We consider now whether the admission of evidence of nonstatutory aggravating factors and the jury instructions permitting consideration of any aggravating circumstances violate the eighth and fourteenth amendments. Appellant Wainwright argues that this court is bound by Florida Supreme Court cases interpreting the Florida capital sentencing statute in which that court has held that consideration of non-statutory aggravating circumstances is harmless error where there are other statutory aggravating factors and no

mitigating factors. See Brown v. State, 381 So.2d 690 (Fla.1980); Douglas v. State, 373 So.2d 895 (Fla.1979); Ellege v. State, 346 So.2d 998 (Fla. 1977). Henry, on the other hand, argues that these cases regarding harmless and reversible error are not relevant to the constitutional issue before us--namely, whether a jury charge permitting consideration of nonstatutory aggravating factors violates the eighth and fourteenth amendments because it fails adequately to channel the jury's discretion in determining whether to impose the death penalty. Agreeing with Henry, we conclude that such a jury instruction contravenes the constitutional directive in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d

346 (1972), and its progeny that jury discretion in capital sentencing be sufficiently guided so as to avoid the arbitrary and selective imposition of the death penalty.

As identified by the Supreme Court in Furman, the evil that must be avoided--the feature which rendered pre-Furman capital sentencing procedures the instrument of cruel and unusual punishment-is the irregular or selective application of the death penalty. Id. at 242, 92 S.Ct. at 2728 (Douglas, J., concurring). Consequently the eighth and fourteenth amendments require states to adopt and follow procedures that minimize the risk of arbitrary and discriminatory infliction of the death penalty and that provide a "meaningful basis for dis-

tinguishing the few cases in which itis imposed from the many cases in which it is not." Id. at 313, 92 S.Ct. at 2764 (White, J., concurring).[5] We believe that permitting the jury to consider whatever evidence of nonstatutory aggravating circumstances the prosecution might desire to present or the jurors might discern in the testimony opens

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5. "The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." 408 U.S. at 256, 92 S.Ct. at 2735 (Douglas, J., concurring)(emphasis added).

too wide a door for the influence of arbitrary factors on the sentencing determination. By sanctioning consideration of statutory aggravating factors plus anything else the jury determines to be aggravating, such an instruction broadens jury discretion rather than channels it and obscures any meaningful basis for distinguishing cases in which the death penalty is imposed from those in which it is not.

The Florida Supreme Court acknowledges that the introduction and consideration of nonstatutory aggravating factors is, under its statute, error. See Brown v. State, 381 So.2d 690, 696 (Fla.1980); Elledge v. State, 346 So.2d 998, 1002 (Fla.1977). Based on its interpretation of two footnotes in

Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976),[6] however, it concludes that death sentences partially predicated on nonstatutory aggravating factors do not violate constitutional prohibitions. Ellege v. State, 346 So.2d 998, 1002-03 (Fla. 1977). The Florida court reasons that the essential evil in the use of

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6. In footnote 8 the Court in Proffitt stated that "it is unclear whether the Florida court would uphold a death sentence based entirely on nonstatutory aggravating circumstances," 428 U.S. at 250 n.8, 96 S.Ct. at 2965-66 n.8 (emphasis added), and suggested that such a result seems unlikely. In response to an allegation "that Florida's sentencing system fails to channel the discretion of the jury or judge because it allows for consideration of nonstatutory aggravating factors," the Court further observed that the only Florida Supreme Court case to approve this practice upheld the death penalty only after recasting the trial

such factors is allowing nonstatutory aggravating circumstances to override mitigating circumstances in the weighing process. Id. at 1003. If any substantial[7] mitigating factors are present, the introduction of non-statutory aggravating factors is

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court's six nonstatutory aggravating circumstances into two statutory and two nonstatutory factors. Id. at 256 n.14, 96 S.Ct. at 2968 n. 14.

We cannot agree with the Florida Supreme Court that these passages endorse the use of nonstatutory aggravating factors in the sentencing process as long as other statutory factors are present.

7. In Brown v. State, 381 So.2d 690 (Fla. 1980), the Florida Supreme Court seems to have reduced its requirement in Ellege that there be absolutely no mitigating factors to a requirement that there be no major mitigating factors. See id. at 696.

reversible error since a court is unable to determine whether the death sentence was the result of such improper weighing of the evidence. Where mitigating factors are absent, though, there is no danger that the unauthorized factor tipped the scale in favor of death.

With all due respect to the Florida Supreme Court, we believe that this careful analysis falls wide of the mark, for "our task is not restricted to an effort to divine what motives impelled [this] death penalt[y]. Rather, we deal with a system of law and justice that leaves to the uncontrolled discretion of judges and juries the determination whether defendants committing these crimes shall die or be imprisioned. Furman v. Gerogia, 408 U.S. 238, 253,

92 S.Ct. 2726, 2734, 33 L.Ed.2d 346 (Douglas, J. concurring). Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination.[8] The guarantee against cruel and unusual punishment demands more.

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8. Compare Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted, ___ U.S. ___, 101 S.Ct. ___, 69 L.Ed.2d ___, 50 U.S.L.W. 3212 (October 6, 1981), in which we vacated a death sentence imposed on the basis of a statutory aggravating circumstance later declared unconstitutional, even though there were two other statutory aggravating factors, either of which by itself was legally sufficient to permit the jury to impose the death penalty. Because it was impos-

In short, appellant's argument in this case seeks this court's approval of a practice that violates the spirit, if not the letter, of Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In Proffitt the Supreme Court held Florida's death penalty statute constitutional on its face inasmuch as it appeared to provide specific and detailed guidance to the

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sible to "determine with the degree of certainty required in capital cases that the [improper] evidence ..., together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty," we held that the jury's discretion had not been sufficiently channeled to enable "rational review" of the sentencing process. Id. at 406.

Such a guessing game is the antithesis of the rational review of the jury's application of clear and objective standards contemplated by Furman and its

judge and jury at the sentencing stage. We are bound to disapprove of the trial court's ignoring the limitations imposed by the statute itself and increasing rather than decreasing the risk that the death penalty will be imposed in an arbitrary and capricious manner through the introduction of nonstatutory aggravating circumstances. The Supreme Court of Florida is, properly, the tribunal to rule on that state's

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progeny. See Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 94 (1976) (opinion of Stewart, Powell and Stevens, JJ.). The introduction of extraneous factors not reduced to clear statutory guidelines defeats the goal of consistent application of objective factors.

statutory requirement.[9] Here, however, the limitations of the statute make the death penalty constitutional. Ignoring those limitations thus implicates the constitution.

Because the state trial court committed constitutional error in admitting evidence of and permitting jury consideration of nonstatutory aggravating circumstances, Henry's death sentence

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9. We note as well that we intimate no view on the question whether the Florida legislature might constitutionally add to its capital sentencing statute assault on a peace officer during an attempted arrest as a statutory aggravating circumstance.

must be vacated.[10] For the foregoing reasons, the district court's judgment is

AFFIRMED.

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10. Appellant Wainwright has argued that the jury instructions, even if erroneous, was not an error of constitutional dimension and therefore also has addressed the question of whether an erroneous, though constitutional, jury charge requires reversal of a death sentence. Because we decide the first argument adversely to Wainwright, we need not address the latter argument.

James Dupree HENRY,
Petitioner-Appellee-Cross-Appellant,

v.

Louie L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent-Appellant-Cross-Appellee.

No. 80-5184.

United States Court of Appeals,*
Fifth Circuit.
Unit B

Sept. 20, 1982

Florida prisoner under death sentence petitioned for writ of habeas corpus. The

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

United States District Court for the Middle District of Florida, John A. Reed, Jr., J., granted the writ if the state trial court failed to provide a second sentencing hearing within 90 days of the court's order. Custodian appealed. The Court of Appeals, 661 F.2d 56, affirmed. The United States Supreme Court, 102 S.Ct. 2922, vacated judgment of Court of Appeals and remanded for further consideration. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) petitioner's claim was properly presented for federal habeas review, and (2) state trial court committed constitutional error by allowing nonstatutory aggravating circumstances to be placed before and considered by jury at petitioner's sentencing hearing.

Judgment of District Court affirmed.

1. Habeas Corpus §45.3(8)

If state appeals court dealt with merits of habeas corpus petitioner's objection, then federal habeas court would also be required to determine merits of such claim, whether or not there was procedural default at trial under state law.

2. Habeas Corpus §45.3(1)

If state courts found issue barred because of procedural default, federal habeas review would be precluded absent showing of cause and prejudice.

3. Habeas Corpus §45.3(1)

For federal habeas corpus purposes, failure of trial counsel to belabor point once raised and clearly lost was not "procedural default" under state law.

See publication Words and Phrases for other judicial constructions and definitions.

4. Habeas Corpus §85.1(1)

In context of federal habeas corpus proceeding, where state courts' opinions do not make it clear that point is not passed upon due to failure to preserve it by timely objection, state must be presumed to have applied its own rules to reach and reject claim on the merits.

5. Habeas Corpus §92(1)

Looking to state law to determine what state courts have done in case before Court of Appeals is necessary, accepted analysis in habeas cases.

5. Habeas Corpus §45.1(4)

Where there was no support under state law or history of litigation at bar for inference that habeas corpus petitioner's constitutional claim was decided and rejected on procedural grounds rather than on the merits, issue was property before Court of Appeals on petition for habeas

corpus relief.

7. Constitutional Law §270(2)

Criminal Law §1213

In capital case, admission of evidence of nonstatutory aggravating factors and jury instructions permitting consideration of any aggravating circumstances, statutory or nonstatutory, violated Eighth and Fourteenth Amendments. U.S.C.A.Const. Amends. 8, 14.

Appeals from the United States District Court for the Middle District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before HILL, Circuit Judge, SMITH**, and HENDERSON, Circuit Judges.

JAMES C. HILL, Circuit Judge:

** Honorable Edward S. Smith, Judge for the U.S. Court of Claims, sitting by designation.

This case was decided by this panel sitting as the United States Court of Appeals for the Fifth Circuit (Unit B) in an opinion and judgment dated November 12, 1981, and reported at 661 F.2d 56. The Supreme Court, ___ U.S. ___, 102 S.Ct. 2922, 73 L.Ed.2d ___ vacated the circuit court judgment and remanded the case to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Engle v. Isaac, ___ U.S. ___, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Finding that Isaac does not lead to a different result in this case, we reinstate the prior judgment. Nevertheless, some elaboration is necessary.

I.

In Isaac, the Supreme Court reaffirmed its holding in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), that failure to comply with a state procedural rule, such as a contemporaneous objection rule, bars federal habeas review of alleged constitutional error absent a showing of cause for noncompliance and actual prejudice. ___ U.S. ___, 102 S.Ct. at 1572. Isaac further held "that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." id. at ___, 102 S.Ct. at 1572, and that alleged unawareness of a constitutional claim at

the time of the trial does not constitute cause where "the tools to construct" the constitutional claim were available, id. at ___, 102 S.Ct. at 1574.

Isaac involved a situation where there had been no objection to the allegedly erroneous instruction at trial. While the Supreme Court was uncertain whether the Ohio appeals courts reviewing Isaac's claim had been presented with the constitutional attack, ___ U.S. at ___ n.27, 102 S.Ct. at 1570, n.27, it observed that the Ohio Supreme Court had enforced a procedural bar in other cases "against the very due process argument raised" in Isaac. Id. at ___, 102 S.Ct. at 1570. The Court believed that if the state courts had been presented with the constitutional issue, they had determined "that the claim was waived." ___ U.S. ___ n.27, 102 S.Ct. at

1570 n.27. The Court thus dealt with a constitutional claim that had been "forfeited before the state courts." ___ U.S. ___, 102 S.Ct. at 1570.

In this case, Henry has asserted that the state trial court committed an error of constitutional dimension at Henry's sentencing hearing by admitting evidence of and permitting jury consideration of non-statutory aggravating circumstances. We agreed and affirmed the district court's judgment vacating Henry's death sentence. 661 F.2d at 58-61. In contrast to Isaac we did not deal with a claim that was forfeited before the state courts. Because our earlier opinion may not have made that entirely clear and since we have had the opportunity to reconsider the Sykes problem in light of Isaac, we shall review the grounds supporting the conclusion that

Henry's claim was properly presented for federal habeas review.

II.

Appellant Wainwright has urged that no allegation of error pertaining to the trial judge's instruction was made on Henry's direct appeal to the Florida Supreme Court, the court refused to excuse that default when it later considered Henry's appeal from a state court order denying post-conviction relief, and that federal habeas review of the instruction is improper. We disagree, finding that Henry presented to the state appeals courts his constitutional attack on the jury's consideration of non-statutory aggravating circumstances.

First, we observe that the opinion reflecting the Supreme Court's collateral review of Henry's conviction does not state that Henry failed to raise the aggravating

circumstances issue in his direct appeal. The court noted that the state circuit judge had ruled that all issues save one "either were raised or should have been raised on direct appeal."[1] 377 So.2d 692 (Fla.1979). It held, "as to all but one of these rulings, the trial court properly determined that the matters presented may not be attacked in a proceeding for post-conviction relief." Id. The issue Henry

[1] Florida provides limited collateral review of convictions; prisoners may not raise claims that were or could have been litigated on direct appeal.

raises here was not one of the two issues that were subject to collateral review. There was, however, no other discussion of the issues which the court found were raised, or should have been raised, on direct appeal.

The Florida Supreme Court's opinion in Henry's direct appeal does not list or describe any of the errors Henry asserted. Thus neither the direct appeal opinion nor the collateral review opinion supports the inference that Henry defaulted by failing to present the issue in question to the state courts.

Our conclusion that the issue was presented is based upon arguments from Henry's brief on direct appeal to the Florida Supreme Court. The appellant does not dispute Henry's assertion that point IV of Henry's brief "challenged the admission

and consideration of non-statutory aggravating factors, inter alia, on the grounds that the strict guidelines of the statute must be followed "to conform to the constitutional mandates of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), limiting arbitrariness and abuse of discretion in the sentencing procedure . . . .'" Petitioner-Appellee's Memorandum of Law on Remand at 9. On Petition for Rehearing, Henry again argued to the Florida Supreme Court that a death sentence imposed pursuant to the trial court's interpretation of Florida's statutory scheme would be unconstitutional. Id.

[1,2] Whether Henry's constitutional claim may be dealt with on the merits on federal habeas review thus depends upon how the state appeals courts dealt with the

issue. If Florida dealt with the merits of Henry's objection, whether or not there was a procedural default at trial under state law, then a federal habeas court must also determine the merits of the claim. Lefkowitz v. Newsome, 420 U.S. 283, 393 n.9, 95 S.Ct. 886, 891 n.9, 43 L.Ed.2d 196 (1975); Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir), cert. denied, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979). If the state courts found the issue barred because of procedural default, then federal habeas review is precluded absent a showing of cause and prejudice. Isaac, U.S. ___, 102 S.Ct. at 1572; Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

III.

On Henry's direct appeal, the Florida Supreme Court concluded that "no reversible

error is made to appear. . . ." 328 So.2d 430 at 432. This language suggests that it dealt with Henry's claim on the merits. Cf. Clark v. Blackburn, 632 F.2d 531, 533 n.1 (5th Cir. 1980) ("In affirming the state trial court's denial of a habeas relief, the Louisiana Supreme Court did not rely on the contemporaneous objection rule but denied the writ because no showing had been made sufficient to 'warrant a finding that the trial judge's ruling was in error.'" (quoting State ex rel Clark v. Maggio, 347 So.2d 260 (La.1977))). We might hesitate to rely on that language alone to conclude that the merits were reached, but we find that two alternative

lines of reasoning reinforce such a conclusion.[2]

IV

[3] The first thing leading us to believe that Florida must have reached the merits of Henry's argument is that, contrary to the appellant's assertions, there appears to have been no procedural default at trial. Everyone agrees, as the record abundantly shows, that petitioner's counsel, when presented with certain

[2] These grounds are set forth in our previous opinion but our reasoning was not fully explained there.

evidence of Henry's conduct, objected at the first opportunity on the grounds that the testimony constituted a non-statutory aggravating factor and was thus unlawful. All the parties agree that the trial judge overruled that objection, holding that circumstances not specified by the capital sentencing statute, as well as those listed therein, could be considered by the jury. The state argues that procedural default occurred when counsel failed to belabor the point by restating his contentions when the trial judge, in keeping with his earlier ruling, instructed the jury to consider "all factors which are aggravating including, but not limited to," those enumrated in the statute. We do not view the failure of trial counsel to belabor a point once raised and clearly lost as a

procedural default under Florida law.[3]

State court proceedings in this very case confirm our beliefs. The state trial judge in the post-conviction review ruled

[3] In concluding in our previous opinion that Henry's objection at trial was sufficient, we found that "any further objection to the jury instructions permitting consideration of non-statutory aggravating factors would have been futile." 661 F.2d at 58. The futility of further objection by Henry was the standard by which procedural defaults could be assessed under Florida law. See Brown v. State, 206 So.2d 377 (Fla.1968). We were not stating that futility would constitute cause for a failure to object at trial under the Sykes cause and prejudice test, thus Isaac does not affect our analysis on that point.

that Henry's counsel was not deficient in failing to object to the instruction because he had already objected on that point of law:

> [T]he defense attorney had objected to the evidence of non-statutory aggravating circumstances being presented to the jury and the objection was overruled. Since the trial judge had ruled on this point, no further objection was required.

This holding was affirmed by the Supreme Court of Florida. 377 So.2d at 693.

V.

[4,5] Even if there was a procedural default at trial in that counsel did not belabor the point by objecting to the jury instruction, we find that the state courts must have excused the default in order to reach the merits. This would have been consistent with established state law; in death cases, the Florida Supreme Court exercises a special scope of review

enabling them to excuse procedural defaults. Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977) ("Admittedly the testimony . . . was not objected to by appellant's trial counsel, but that should not be conclusive of the special scope of review by this court in death cases."). In the situation presented here, where the state courts' opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied its own rules to reach and reject the claim on

the merits.[4]

[4] Otherwise, federal habeas review would unjustly be denied a prisoner who has no way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying Sykes and Isaac, for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.

The appellant asserts that we have circumvented Sykes and Isaac by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest that past excuse of a default in another case allows a federal court to excuse a default in a case where the state courts have not. Instead, we have looked to Florida to determine what the state courts have done in the case before us. This is a

VI.

[6,7] We conclude that there is no support under Florida law or the history of this litigation for the inference that Henry's constitutional claim was decided and rejected on procedural grounds rather than on the merits. The issue is, therefore, properly before this court. We adhere to our earlier judgment that the state trial court committed constitutional error by allowing the non-statutory

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necessary, accepted analysis in habeas cases. See, e.g., County Court v. Allen, 442 U.S. 140, 149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979).

aggravating circumstances to be placed before and considered by the jury at Henry's sentencing hearing. 661 F.2d at 60. Because of that error, Henry's sentence must be vacated. Accordingly, the judgment of the district court is AFFIRMED.

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